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15:28:44 1 damage to exceed \$250. The defendant did cause
15:28:47 2 said damage to the above-mentioned property without
15:28:49 3 the permission of the owner.

15:28:51 4 And the owner is what? The City of Buffalo?

15:28:54 5 **A.** Yes.

15:28:54 6 **Q.** Okay. All right. Okay. Let's turn
15:29:02 7 the page, and the next one, for disorderly conduct,
15:29:04 8 on page 2 of Exhibit 17, reads that that's
15:29:07 9 a violation, as opposed to a felony.

15:29:10 10 It says, the said defendant, at the
15:29:13 11 aforesaid time and place, with intent to cause
15:29:16 12 public inconvenience, annoyance, or alarm, or
15:29:20 13 recklessly creating a risk thereof, while in
15:29:23 14 a public place, did use abusive or obscene
15:29:27 15 language, or made an obscene gesture.

15:29:29 16 We haven't talked about gestures. Did
15:29:31 17 Mr. Kistner make any obscene gestures that you
15:29:34 18 remember?

15:29:34 19 **A.** I don't remember.

15:29:35 20 **Q.** Okay. In the time that you saw him
15:29:37 21 from the moment that he was handcuffed and brought
15:29:40 22 to his feet by some officers, was -- was he in
15:29:44 23 handcuffs the entire time?

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15:29:47 1 **A.** I'm -- I'm sorry. Could you say

15:29:49 2 that --

15:29:49 3 **Q.** Did you ever see him out of handcuffs

15:29:51 4 from the time he was first handcuffed, until you

15:29:53 5 took him, say, to central booking?

15:29:55 6 **A.** He was cuffed to the hospital bed with

15:29:57 7 one hand.

15:29:58 8 **Q.** Okay. So was he making gestures with

15:30:01 9 the other hand or --

15:30:01 10 **A.** I don't remember.

15:30:02 11 **Q.** Okay. So why did you say, did use

15:30:05 12 abusive or obscene language or made an obscene

15:30:07 13 gesture?

15:30:08 14 **A.** That's just the verbiage that is typed

15:30:10 15 up according to the penal law charge.

15:30:12 16 **Q.** Okay. So you don't remember him making

15:30:13 17 any obscene gestures. He didn't flip anybody the

15:30:17 18 bird or give them the finger or anything.

15:30:18 19 **A.** I don't remember.

15:30:19 20 **Q.** Okay. And you wouldn't have charged

15:30:21 21 him with something you didn't remember, right?

15:30:22 22 **A.** Right. That's just -- like I said,

15:30:25 23 that's the -- the verbiage that the report --

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15:30:27 1 report technicians type up according to the penal
15:30:28 2 law charge.

15:30:29 3 Q. Well, I know that, but you said it, so
15:30:32 4 I just want to make sure that you don't recall him
15:30:34 5 making any gestures.

15:30:35 6 A. I don't remember.

15:30:36 7 Q. Okay. In that the defendant did
15:30:38 8 intentionally throw his body into the driver's side
15:30:40 9 mirror, et cetera, and so forth.

15:30:41 10 And that is language that's replicated from
15:30:46 11 the criminal mischief charge, right?

15:30:49 12 A. Yes.

15:30:49 13 MS. HUGGINS: Form.

15:30:50 14 BY MR. RUPP:

15:30:51 15 Q. All right. So why is that in the
15:30:52 16 disorderly conduct charge?

15:30:53 17 A. Again, that's -- the report
15:30:55 18 technicians, that's the way that they type up
15:30:57 19 charges. That's -- that's how they type it.

15:31:00 20 Q. Okay. So could you have made changes
15:31:02 21 to this, if you wanted to?

15:31:03 22 A. Yes.

15:31:03 23 Q. Okay. You didn't ask them to make any

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15:31:05 1 changes?

15:31:05 2 **A.** I did not.

15:31:06 3 **Q.** Okay. So was the disorderly conduct
15:31:09 4 charge, in your view, because he had thrown his
15:31:12 5 body at the driver's side mirror of your vehicle?

15:31:14 6 **A.** No. The disorderly conduct was
15:31:16 7 pertaining to the next sentence.

15:31:18 8 **Q.** Okay. All right. So that's in here
15:31:21 9 kind of extraneously, would you agree?

15:31:24 10 **A.** Again, I don't know the guidelines that
15:31:27 11 the report -- report technicians type up their
15:31:29 12 charges.

15:31:30 13 **MR. RUPP:** Okay. All right. I'm going to
15:31:37 14 ask that this be marked.

15 **The following was marked for Identification:**

16 **EXH. 18** **Fleet management maintenance**
17 **work order**

18 **BY MR. RUPP:**

15:32:16 19 **Q.** All right. Ms. McDermott, I'm going to
15:32:19 20 show you Exhibit 18 for identification. First of
15:32:20 21 all, have you seen a form similar to this one
15:32:24 22 before in your work as a police officer for BPD?

15:32:27 23 **A.** I have not.

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15:32:28 1 Q. Okay. So you're not really familiar
15:32:30 2 with this form then.

15:32:31 3 A. Correct.

15:32:31 4 Q. Okay. But do you see that it purports
15:32:34 5 to relate to unit 473, which is your unit, a Tahoe?

15:32:39 6 A. Yes, I see that.

15:32:40 7 Q. Being a 2014, is that -- does that also
15:32:44 8 ring a bell?

15:32:45 9 A. Yes.

15:32:45 10 Q. Okay. Being in for service four days
15:32:48 11 after the incident involving Mr. Kistner. Do you
15:32:49 12 see that?

15:32:50 13 A. Yes.

15:32:50 14 Q. And indication that there was
15:32:53 15 apparently work done on the cooling system, some
15:32:58 16 R/R water pump, and the serpentine belt. Do you
15:33:02 17 see that?

15:33:02 18 A. Yes.

15:33:02 19 Q. Would you agree with me there's no
15:33:04 20 references to a mirror or a driver's side front
15:33:08 21 window?

15:33:09 22 A. Correct.

15:33:09 23 Q. Okay. Do you know of any other repair

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15:33:11 1 records that would verify your under-oath statement
15:33:15 2 that the driver's side mirror and the -- well, the
15:33:25 3 driver's side mirror was broken, causing damage of
15:33:31 4 more than \$250?

15:33:33 5 **A.** I don't know of any other maintenance --

15:33:35 6 **Q.** All right.

15:33:36 7 **A.** -- paperwork, no.

15:33:37 8 **MR. RUPP:** Okay. All right. Let's have
15:33:48 9 this marked.

10 **The following was marked for Identification:**

11 **EXH. 19** **Buffalo Police dispatch**
12 **monitor - unit history**
13 **report**

14 **BY MR. RUPP:**

15:34:34 15 **Q.** All right. Showing you what has been
15:34:36 16 marked Exhibit 19 for identification, this is --
15:34:38 17 purports to be the dispatch monitor unit history
15:34:42 18 report for you, who are referred to as unit C241.
15:34:46 19 Do you see that?

15:34:47 20 **A.** Yes.

15:34:47 21 **Q.** Okay. And that's Officer Lauren
15:34:50 22 McDermott. And that -- that number 172768, what is
15:34:53 23 that?

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15:34:54 1 **A.** That's my DID number.

15:34:56 2 **Q.** What does that stand for?

15:34:59 3 **A.** It's my --

15:35:00 4 **Q.** Department ID?

15:35:01 5 **A.** Yes.

15:35:01 6 **Q.** Okay. And have you had that same

15:35:03 7 number since you joined the BPD?

15:35:05 8 **A.** Yes.

15:35:05 9 **Q.** And do you still have it today?

15:35:07 10 **A.** Yes.

15:35:07 11 **Q.** Okay. It doesn't change with your

15:35:09 12 position.

15:35:10 13 **A.** Correct.

15:35:10 14 **Q.** Okay. So this shows that you were

15:35:12 15 dispatched to Schmarbeck on January 1, 2017, at

15:35:18 16 10:57 a.m. Is that -- do you know if you were

15:35:21 17 there before that or after that or --

15:35:27 18 **A.** I believe that's when Officer Schultz

15:35:29 19 called it out.

15:35:29 20 **Q.** Okay.

15:35:31 21 **A.** When -- yeah.

15:35:32 22 **Q.** You were -- you already think you were

15:35:35 23 there before that?

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15:35:35 1 **A.** I believe so.

15:35:36 2 **Q.** Okay. And I'm not going to go back
15:35:38 3 through 4A again. I'm just going to see if I can
15:35:41 4 link this up.

15:35:43 5 So this doesn't have the seconds, just
15:35:47 6 the -- the minutes on it, right?

15:35:48 7 **A.** Yes.

15:35:49 8 **Q.** Okay. And 4A does show you as being
15:35:53 9 en route/dispatched at the 10:57 mark.

15:35:58 10 **A.** Along with -- yes. Yes, it does.

15:36:00 11 **Q.** Along -- along with Officer Velez,
15:36:03 12 of course.

15:36:03 13 **A.** Yes.

15:36:03 14 **Q.** Okay. Okay. And this shows your shift
15:36:05 15 ending at 6:16, so I guess that answers the question
15:36:09 16 that we saw on the second page of whether your
15:36:13 17 overtime that day was -- was just, you know,
15:36:17 18 a few minute -- 45 minutes after your quitting time
15:36:20 19 or -- or over two hours after.

15:36:21 20 **A.** This is, again, based on what dispatch
15:36:25 21 is logging.

15:36:26 22 **Q.** Oh, so this would -- so the payroll
15:36:29 23 would be what governs.

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15:36:31 1 **A.** Correct.

15:36:31 2 **MR. RUPP:** Okay. All right. Do we have the
15:36:32 3 payroll?

15:36:33 4 **MR. DAVENPORT:** No, but we did send a second
15:36:37 5 document request.

15:36:38 6 Did you get that yet?

15:36:39 7 **MS. HUGGINS:** I don't believe so.

15:36:40 8 **MR. RUPP:** All right. Well, I'll make
15:36:40 9 a document production request that I'll ask Anne to
15:36:43 10 index for me for the start and end times of her
15:36:47 11 shift that day.

15:36:49 12 I don't need to know her pay rate or
15:36:51 13 anything like that.

15:37:00 14 Okay. Let's mark this.

15 **The following was marked for Identification:**

16 **EXH. 20** **Notice to defendant of**
17 **intention to offer evidence**
18 **at trial**

15:37:52 19 **BY MR. RUPP:**

15:37:52 20 **Q.** All right. Let me show you what's been
15:37:55 21 marked as Exhibit 20 for identification.

15:37:59 22 First of all, do you know if this is the
15:38:01 23 full document?

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15:38:03 1 It looked to me like it almost needed to
15:38:06 2 have a second page. There's no signature line. It
15:38:08 3 seems to end kind of abruptly. Do you know if
15:38:10 4 there's a second page to this document?

15:38:12 5 **A.** We don't sign these documents.

15:38:15 6 **Q.** Okay. Well, that takes care of
15:38:17 7 the signature page, but the question still
15:38:19 8 stands: Do you know whether this is a one-page
15:38:21 9 document?

15:38:21 10 **A.** I believe this -- I -- I believe this
15:38:25 11 is the bottom of the page, but I -- I --

15:38:26 12 **Q.** Okay. Fair enough.

15:38:28 13 **A.** Yeah.

15:38:29 14 **Q.** That's how it was produced, so I
15:38:30 15 just -- I just had a question about it.

15:38:32 16 All right. So we know this is a -- a notice
15:38:33 17 to the defense of statements that are going to be
15:38:36 18 used against Mr. Kistner.

15:38:39 19 Did you prepare this form?

15:38:40 20 **A.** I did not.

15:38:41 21 **Q.** Do you know why it says the date is
15:38:45 22 January 2nd, 2017?

15:38:47 23 Bottom left-hand corner, about an inch and

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15:38:50 1 a half up from the bottom line of text.

15:38:52 2 **A.** I don't know why that date would be on
15:38:53 3 there.

15:38:53 4 **Q.** Okay. And you've got some of the
15:39:00 5 statements about Nazis and fascists that you were
15:39:04 6 telling me about earlier, right?

15:39:05 7 **A.** Yes.

15:39:06 8 **Q.** Okay. But the second paragraph of
15:39:09 9 things that was said said the defendant did
15:39:12 10 spontaneously state to Police Officer Velez:
15:39:17 11 Charge me criminally to cover yourself. You're
15:39:20 12 scared.

15:39:21 13 Do you see that part?

15:39:22 14 **A.** Yes.

15:39:22 15 **Q.** Okay. So you then knew, after being
15:39:28 16 placed under arrest and while at ECMC, that
15:39:30 17 Mr. Kistner believed that you had arrested him to
15:39:34 18 cover up for your own negligence in operating the
15:39:37 19 SUV that day. Were you aware of that?

15:39:39 20 **MS. HUGGINS:** Form.

15:39:39 21 **THE WITNESS:** That's what he was saying,
15:39:41 22 yes.

15:39:41 23 **BY MR. RUPP:**

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15:39:41 1 Q. Okay. So I'm -- I'm not -- I'm not
15:39:42 2 asking you to agree that it was true. Okay?

15:39:45 3 I'm just asking you if from this quoted
15:39:48 4 statement -- that's in quotes, right?

15:39:49 5 A. Yes.

15:39:49 6 Q. -- you knew that Mr. Kistner was taking
15:39:52 7 the position that you had arrested him and charged
15:39:54 8 him criminally to cover your own negligence in
15:39:57 9 striking him with the SUV; is that fair?

15:40:00 10 A. Yes.

15:40:00 11 Q. Okay. All right. And in the next
15:40:02 12 paragraph, again, he is quoted as saying, if you
15:40:06 13 keep telling your lies so wildly, someone might
15:40:10 14 believe you. Your story ain't going to fly.
15:40:13 15 Internal affairs is going to eat your ass alive.

15:40:16 16 And that's a direct quote, right?

15:40:18 17 A. Yes.

15:40:18 18 Q. Now, again, did you put this down or
15:40:21 19 did Velez put it down?

15:40:22 20 A. It looks like this one was stated to
15:40:24 21 both of us.

15:40:25 22 Q. Okay. So do you know -- like the --
15:40:28 23 the typing in the middle, these paragraphs, this is

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15:40:30 1 a form, but somebody typed this in in the middle of
15:40:33 2 the form or -- or used a computer. Do you know who
15:40:34 3 did it? Who typed that?

15:40:36 4 **A.** A report technician types it.

15:40:37 5 **Q.** Okay. All right. So from a written
15:40:39 6 record -- a handwritten record or just from you
15:40:43 7 orally?

15:40:43 8 **A.** I don't -- I don't remember.

15:40:44 9 **Q.** Okay. Do you remember Mr. Kistner
15:40:47 10 saying: If you keep telling your lies so wildly,
15:40:50 11 someone might believe you. Your story ain't going
15:40:54 12 to fly. Internal affairs is going to eat your ass
15:40:56 13 alive?

15:40:57 14 **A.** I -- I don't remember --

15:41:00 15 **Q.** Okay.

15:41:00 16 **A.** -- what was said, but I -- I mean,
15:41:03 17 reading it here, it sounds familiar, but I -- I
15:41:06 18 don't remember.

15:41:06 19 **Q.** All right. But at least in terms of
15:41:07 20 what this says, unless this is -- unless this is
15:41:09 21 false -- you don't have any reason to believe this
15:41:13 22 is false.

15:41:13 23 **A.** No, it's not false.

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15:41:14 1 Q. Okay. It's true, in fact.

15:41:15 2 A. Yes.

15:41:15 3 Q. Okay. And at ECMC, Mr. Kistner made it
15:41:18 4 very clear that he thought you were lying, he
15:41:20 5 thought you were covering up your own negligence,
15:41:24 6 and he thought internal affairs was going to
15:41:27 7 investigate you, and that your story was not going
15:41:29 8 to stand up under scrutiny.

15:41:32 9 You knew that at the time you were at ECMC
15:41:34 10 the first time, right?

15:41:35 11 MS. HUGGINS: Form. You can answer.

15:41:37 12 MR. RUPP: Strike it.

15:41:39 13 You knew that Mr. Kistner believed you had
15:41:42 14 made up the story to cover yourself, and you knew
15:41:47 15 that at ECMC on the first time, January 1, 2017.

15:41:53 16 THE WITNESS: It says at ECMC. I couldn't --
15:41:56 17 I don't know if it was the first or second time.

15:41:58 18 BY MR. RUPP:

15:41:58 19 Q. Well, now wait a second. You told me
15:42:01 20 the second time you just pretty much dropped him
15:42:03 21 off.

15:42:03 22 A. No. I said we don't just drop him off,
15:42:06 23 but --

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15:42:06 1 Q. Well, okay.

15:42:06 2 A. I mean, I -- like I said --

15:42:08 3 Q. Do you remember him saying anything --

15:42:08 4 A. -- I don't remember --

15:42:10 5 Q. We can go back.

15:42:12 6 Do you remember him saying -- making any
15:42:13 7 statements like this the second time you took him
15:42:15 8 to ECMC?

15:42:16 9 A. I don't remember if this was the first
15:42:18 10 or second time, no.

15:42:19 11 Q. Okay. Well, my question is: Do you
15:42:21 12 remember him making any statements like this the
15:42:23 13 second time you took him to ECMC?

15:42:24 14 A. I don't remember.

15:42:25 15 Q. Okay.

15:42:25 16 A. I know the next statement was said the
15:42:28 17 first time.

15:42:28 18 Q. Okay. And that's where he used the
15:42:30 19 Nazi term and other language.

15:42:32 20 A. Yes.

15:42:32 21 Q. Okay. And from your recollection of
15:42:35 22 those statements that Mr. Kistner made, did -- did
15:42:41 23 he seem to believe that you had struck him with

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15:42:44 1 your SUV and arrested him to cover up your own
15:42:48 2 negligence?

15:42:48 3 **MS. HUGGINS:** Form.

15:42:49 4 **THE WITNESS:** That's what he seemed to
15:42:50 5 believe.

15:42:50 6 **BY MR. RUPP:**

15:42:50 7 **Q.** Okay. And did he tell that to not only
15:42:57 8 officers, but ECMC people as well?

15:42:59 9 **A.** Again, I wasn't in the room when he
15:43:01 10 spoke with the staff.

15:43:03 11 **Q.** Okay. Well --

15:43:04 12 **A.** We purposely stayed outside of the
15:43:05 13 room.

15:43:05 14 **Q.** But do you know whether at any time you
15:43:07 15 were with him he said that in the presence of ECMC
15:43:10 16 staff?

15:43:12 17 **A.** Yes, because it was relayed to me by
15:43:14 18 the staff.

15:43:15 19 **Q.** Okay. And did you tell them that: No,
15:43:17 20 that wasn't true. He attacked my SUV and flung
15:43:20 21 himself against the mirror to injure himself and
15:43:24 22 cause damage to it?

15:43:24 23 **MS. HUGGINS:** Form.

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15:43:25 1 **THE WITNESS:** I believe I used the word
15:43:27 2 threw or thrown.

15:43:27 3 **BY MR. RUPP:**

15:43:27 4 **Q.** Okay.

15:43:28 5 **A.** Not attacked.

15:43:29 6 **Q.** So, basically, it was Mr. Kistner's
15:43:31 7 word against you police officers who were at ECMC
15:43:34 8 as to what had happened on Schmarbeck that day,
15:43:36 9 correct?

15:43:38 10 **A.** That, and based on what -- other things
15:43:42 11 that he told the staff as well.

15:43:43 12 **Q.** Well, in terms of how the incident had
15:43:46 13 happened, not in terms of name calling, but in
15:43:49 14 terms of the incident happening, you have
15:43:51 15 Mr. Kistner saying you hit him with the SUV and
15:43:54 16 are lying about it to cover up your own negligence,
15:43:57 17 and the officers are all saying, no, Mr. Kistner
15:44:00 18 attacked the SUV.

15:44:00 19 That's basically what's going on at ECMC,
15:44:02 20 right?

15:44:02 21 **A.** He also told ECMC staff other stories
15:44:08 22 of what happened.

15:44:08 23 **Q.** Well, where is that written anywhere?

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15:44:11 1 **A.** I --

15:44:12 2 **Q.** Well, what other stories did he tell
15:44:14 3 you -- did he tell them?

15:44:16 4 **A.** It's in the doctor's report.

15:44:18 5 **Q.** Okay. Is that the one you told me
15:44:20 6 earlier about that he slipped on ice?

15:44:22 7 **A.** That's what he told the doctor.

15:44:23 8 **Q.** Okay. So on the one hand, he's saying
15:44:27 9 that you're lying and covering it up and internal
15:44:30 10 affairs is going to investigate you, and on the
15:44:33 11 other hand, he's allegedly telling somebody that he
15:44:35 12 just slipped on ice?

15:44:36 13 **A.** Yes.

15:44:36 14 **Q.** Okay. And do you believe he slipped on
15:44:38 15 ice?

15:44:38 16 **A.** I don't know.

15:44:39 17 **Q.** Was there any ice on the street?

15:44:40 18 **A.** I don't remember.

15:44:40 19 **Q.** Did you see any in the video?

15:44:43 20 **A.** The video is very grainy. You can
15:44:45 21 barely tell --

15:44:46 22 **Q.** Okay.

15:44:46 23 **A.** -- who was who.

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15:44:47 1 Q. Do you remember what the temperature
15:44:48 2 was on the day of January 1st, 2017?

15:44:51 3 A. I don't remember.

15:45:32 4 MR. RUPP: Okay. If you can mark that.

15:45:32 5 The following was marked for Identification:

6 EXH. 21 Appearance ticket

15:45:32 7 BY MR. RUPP:

15:45:57 8 Q. All right. Ms. McDermott, this
15:46:01 9 obviously is an appearance ticket, right, issued
15:46:03 10 to James Kistner?

15:46:05 11 A. Yes.

15:46:05 12 Q. My only real question is: Do you know
15:46:10 13 when this was given to him?

15:46:11 14 Now, it says that it was committed on the
15:46:14 15 first day of January at 4 p.m., but we know that's
15:46:19 16 not when the incident happened.

15:46:23 17 Do you see that in the middle? That's
15:46:25 18 clearly wrong, right?

15:46:25 19 A. I believe that's when it was given to
15:46:28 20 him and not, obviously, when it was committed.

15:46:31 21 Q. Okay. What makes you believe that?

15:46:33 22 I mean, it says committed, so you're --
15:46:35 23 you're -- you're agreeing -- you're assuming, as

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15:46:37 1 I am, that that's incorrect and that somebody put
15:46:41 2 4 o'clock on, because that seems like close to the
15:46:43 3 time that he was -- well, what is that close to the
15:46:45 4 time of?

15:46:46 5 Would he have been given this at central
15:46:48 6 booking?

15:46:48 7 **A.** He would have. That's not my writing.

15:46:50 8 **Q.** Yeah, I know. That's not your
15:46:53 9 signature either. It says Lieutenant D --

15:46:54 10 **A.** I believe that's Banaszak.

15:46:56 11 **Q.** Banaszak. Okay. So I knew it wasn't
15:46:58 12 yours. And -- and you --

15:46:59 13 **A.** Right.

15:46:59 14 **Q.** -- didn't initial it there either.

15:47:01 15 **A.** Correct.

15:47:01 16 **Q.** So I guess were you present when
15:47:03 17 Mr. Kistner was given the appearance ticket?

15:47:07 18 **A.** I don't remember, but I most likely
15:47:09 19 would have been.

15:47:09 20 **Q.** So let me ask you this: I know that he
15:47:12 21 is released from central booking, he's going to
15:47:14 22 have an appearance ticket, but he's got to go back
15:47:17 23 to ECMC on the 941, right?

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15:47:20 1 **A.** Correct.

15:47:20 2 **Q.** So is he given the appearance ticket to
15:47:22 3 hold in his little hands at central booking, or is
15:47:25 4 that given to the ECMC staff so when they let him
15:47:27 5 go, they hand him the appearance ticket as well?

15:47:30 6 **A.** Oh, I misunderstood. I thought you
15:47:32 7 were asking when this was, like, issued.

15:47:33 8 When it was physically handed to him?

15:47:35 9 **Q.** Right. When he had it in his hand.

15:47:37 10 **A.** That, I don't remember.

15:47:38 11 **Q.** Well, okay. So what is -- what is the
15:47:40 12 procedure?

15:47:41 13 I mean, if -- if he's still in police
15:47:43 14 custody under the 941, would he -- but he's done at
15:47:48 15 central booking, would he be given the appearance
15:47:50 16 ticket there and take it with him to ECMC, or
15:47:53 17 would -- would you give it to him at ECMC, or would
15:47:56 18 you give it to the ECMC staff to give it to him
15:47:59 19 when they let him go?

15:48:01 20 **A.** It is normally filled out, like I said,
15:48:03 21 when we first get to central booking --

15:48:04 22 **Q.** Right.

15:48:05 23 **A.** -- and we give the RT. That's when

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15:48:10 1 it's filled out.

15:48:10 2 Q. Okay.

15:48:10 3 A. But it's not handed at that time,
15:48:12 4 because they still --

15:48:12 5 Q. That part I -- I guess I have.

15:48:14 6 A. Okay.

15:48:14 7 Q. Okay. So --

15:48:14 8 A. So I don't know when I -- when it was
15:48:15 9 given to him. I don't know whether it was after
15:48:17 10 the booking process or when we got to ECMC. That,
15:48:20 11 I don't remember.

15:48:21 12 Q. Well, I guess my question is: I know
15:48:22 13 at some point before he was discharged from ECMC,
15:48:25 14 you and Officer Velez kind of ended your shift and
15:48:29 15 went home. I think you said he was still there
15:48:31 16 when you left, right?

15:48:32 17 A. From the -- from the second --

15:48:32 18 Q. Right.

15:48:33 19 A. Yes. Yes.

15:48:33 20 Q. Right. Right.

15:48:33 21 A. Yes.

15:48:33 22 Q. Right. I know the first one you took
15:48:35 23 him to booking and then you took him -- so I'm --

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15:48:35 1 **A.** Right.

15:48:37 2 **Q.** -- obviously talking about the second
15:48:38 3 one. You left before he left ECMC, right?

15:48:40 4 **A.** As far as I know.

15:48:41 5 **Q.** And nobody came back to give him an
15:48:43 6 appearance ticket, right?

15:48:44 7 **A.** No.

15:48:44 8 **Q.** So before you left, you gave the
15:48:47 9 appearance ticket either to James Kistner or to
15:48:50 10 somebody at ECMC to give to him, right?

15:48:52 11 **MS. HUGGINS:** Form.

15:48:53 12 **THE WITNESS:** Right.

15:48:54 13 **BY MR. RUPP:**

15:48:54 14 **Q.** Which is it?

15:48:55 15 **A.** I don't remember.

15:48:55 16 **Q.** Okay. Well, is it protocol or
15:48:57 17 procedure for you to give an appearance ticket for
15:49:00 18 somebody to a medical doctor and say, hey, give
15:49:03 19 this to him when you're ready?

15:49:04 20 **A.** I -- I don't remember.

15:49:05 21 **Q.** Well, I'm not asking -- I'm not asking
15:49:07 22 if you remember. I'm asking you if an appearance
15:49:10 23 ticket has to be given to the person charged or you

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15:49:12 1 can give it to somebody else and say, give it to
15:49:15 2 him?

15:49:16 3 **A.** I -- it is -- I can say, generally, it
15:49:19 4 is given directly to the person.

15:49:21 5 **Q.** Okay.

15:49:22 6 **A.** In this situation, I -- I don't
15:49:24 7 remember.

15:49:24 8 **Q.** Okay. So it is possible then, you
15:49:26 9 think, that you might have given it to a doctor or
15:49:29 10 somebody at ECMC and said, hey, when -- when you
15:49:32 11 let him go, give him his appearance ticket?

15:49:34 12 **MS. HUGGINS:** Form.

15:49:35 13 **THE WITNESS:** I don't know.

15:49:36 14 **BY MR. RUPP:**

15:49:37 15 **Q.** Okay. Or it's possible that you gave
15:49:38 16 it to Mr. Kistner and he had it with him while he
15:49:41 17 was being processed at ECMC.

15:49:42 18 **A.** Right. I don't remember.

15:49:43 19 **Q.** You just don't know between the two?

15:49:46 20 **A.** I don't remember.

15:49:46 21 **Q.** And there's no policy or procedure that
15:49:49 22 tells you you have to give the defendant the
15:49:51 23 appearance ticket.

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15:49:51 1 **A.** I don't know if there is.

15:49:52 2 **Q.** Okay. Well, if you don't give the
15:49:54 3 defendant the appearance ticket, is that a problem
15:49:56 4 if they don't show up in court?

15:49:58 5 **A.** I -- it would be a problem if they
15:50:02 6 didn't show up in court, yes.

15:50:03 7 **Q.** Right. So would that then suggest to
15:50:06 8 you that there's a procedure or a protocol with
15:50:10 9 booking that you give the appearance direct --
15:50:12 10 ticket directly to the person?

15:50:13 11 **A.** I -- again, if there is, I don't know.

15:50:15 12 **Q.** Okay. All right. And you're aware
15:50:33 13 that Mr. Kistner and his attorneys served
15:50:35 14 interrogatory requests on the City of Buffalo and
15:50:37 15 all the defendants, right?

15:50:40 16 **A.** The -- meaning the -- the suit?

15:50:43 17 **Q.** Yes.

15:50:43 18 **A.** Yes.

15:50:44 19 **Q.** Yes. Yeah.

15:50:45 20 **MS. HUGGINS:** There might just be confusion
15:50:47 21 on the term interrogatory.

15:50:48 22 **THE WITNESS:** Yes.

15:50:49 23 **MR. RUPP:** I understand fully. I'm not

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15:50:51 1 trying to -- I just want to -- you signed
15:50:53 2 a verification page pursuant to 28 USC 1746, under
15:50:57 3 penalty of perjury, that to the best of your
15:50:59 4 knowledge, the information and belief that the
15:51:01 5 foregoing answer to first interrogatories to
15:51:03 6 defendants are true and correct.

15:51:05 7 Did you sign that?

15:51:06 8 **A.** Yes.

15:51:06 9 **Q.** Okay. I'm not even going to mark it,
15:51:10 10 because I just want to make sure: Did you go
15:51:11 11 through the interrogatory responses in full before
15:51:15 12 you signed that verification?

15:51:17 13 **A.** I believe so.

15:51:17 14 **Q.** Okay. So there was nothing in these
15:51:20 15 interrogatory responses that you did not agree to
15:51:24 16 or did not think was factually correct when you
15:51:27 17 signed that.

15:51:27 18 **MS. HUGGINS:** Form. And to be fair,
15:51:28 19 I supplemented one in a cover letter that was
15:51:31 20 included with the interrogatories.

15:51:32 21 **MR. RUPP:** Fair enough. I'll just go with
15:51:34 22 as they existed before the supplement. You had
15:51:37 23 gone through them. There's nothing in there that

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15:51:39 1 you thought was factually inaccurate.

15:51:41 2 I mean, you can look at it again. I'm just
15:51:43 3 trying to save time.

15:51:44 4 **THE WITNESS:** I mean, yeah, it's been -- I
15:51:44 5 mean --

15:51:44 6 **BY MR. RUPP:**

15:51:44 7 **Q.** Okay.

15:51:45 8 **A.** -- it's been a year and a half since --

15:51:45 9 **Q.** Take a look --

15:51:46 10 **A.** -- I --

15:51:46 11 **Q.** Take a look at --

15:51:47 12 **A.** Well, maybe --

15:51:47 13 **Q.** What's the exhibit number?

15:51:48 14 **A.** -- not a year and a half. It's been
15:51:49 15 a while.

15:51:50 16 **Q.** What's the -- what's the exhibit number
15:51:52 17 there?

15:51:52 18 **A.** 13.

15:51:52 19 **Q.** Okay. You know, not all of them -- and
15:51:53 20 the reason I was kind of shying away from having
15:51:55 21 you read it all, so many of them --

15:51:55 22 **MS. HUGGINS:** Yeah.

15:51:55 23 **BY MR. RUPP:**

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15:51:57 1 Q. -- don't really relate to you
15:51:58 2 factually. But I'm just talking about the ones
15:51:59 3 that relate to the facts of Mr. Kistner's arrest
15:52:01 4 and what happened that day, you believed those to
15:52:04 5 be true when you signed the verification?

15:52:06 6 A. I'm sorry. This is the one that --
15:52:08 7 yeah. Yes. This one I more recently looked at.
15:52:10 8 I was -- I was thinking what was served to me on
15:52:13 9 the day that it was served. I misunderstood.

15:52:15 10 MS. HUGGINS: I think she's just confused
15:52:17 11 what is a summons and complaint versus
15:52:18 12 interrogatories.

15:52:19 13 MR. RUPP: Oh, okay. Yeah. Yeah.

15:52:20 14 MS. HUGGINS: And I don't mean to overstep.
15:52:22 15 Did -- have we met and discussed interrogatories
15:52:24 16 with relation to this case?

15:52:25 17 THE WITNESS: Yes.

15:52:25 18 MS. HUGGINS: Have you reviewed
15:52:26 19 interrogatories and then -- and based on your
15:52:29 20 knowledge, signed off on them?

15:52:30 21 THE WITNESS: Yes.

15:52:31 22 MS. HUGGINS: Is that -- I'm not trying to
15:52:32 23 overstep, but I'm --

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15:52:34 1 **MR. RUPP:** You're doing -- you're doing
15:52:35 2 fine. Keep going.

15:52:35 3 **MS. HUGGINS:** I'm trying to cut through.

15:52:36 4 **THE WITNESS:** Yeah. I misunderstood.

15:52:39 5 I was -- when you said it, I was thinking the day
15:52:40 6 I was served.

15:52:40 7 **BY MR. RUPP:**

15:52:41 8 **Q.** I'll tell you exactly why I'm asking.

15:52:43 9 I just don't want a situation where you tell me
15:52:45 10 that you -- you really -- something that was in the
15:52:47 11 interrogatory, you really didn't review it and you
15:52:49 12 really weren't sure, so when you signed and said it
15:52:51 13 was factually true and accurate, you must have
15:52:53 14 missed that one.

15:52:54 15 You read these, you went over them with
15:52:55 16 counsel, and they were true to the best of your
15:52:57 17 knowledge.

15:52:57 18 **A.** Yes.

15:52:57 19 **Q.** Okay. And that's why you signed the
15:52:59 20 form under penalty of perjury.

15:53:01 21 **A.** Yes.

15:53:02 22 **Q.** That's all I really kind of needed.
15:53:04 23 Thank you.

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15:53:12 1 Okay. All right. So I did promise the
15:53:16 2 City's attorney that there was another video that
15:53:20 3 I think was a supplemental disclosure. I'm just
15:53:22 4 going to show you that. I think it's from
15:53:24 5 a slightly different camera angle. And we're going
15:53:28 6 to get that up on the screen in just a second.

15:54:14 7 Okay, Ms. McDermott, I'm going to -- first
15:54:16 8 of all, just to orient us to what we're looking at
15:54:19 9 here, we're back to 10:25 a.m., according to the
15:54:23 10 time stamp -- I'm not asking you to vouch for its
15:54:26 11 accuracy -- on 1/1/2017.

15:54:29 12 It looks like the C District patrol vehicle
15:54:35 13 Tahoe 532 is what's shown in that picture; do you
15:54:39 14 agree with me?

15:54:40 15 **A.** Yes.

15:54:41 16 **MR. RUPP:** At the 00 point.

15:54:42 17 So I'm going to start it, and I think you're
15:54:44 18 going to see that vehicle move. All right.

15:54:49 19 (Video clip played.)

15:54:49 20 **BY MR. RUPP:**

15:54:49 21 **Q.** And do you know one way or the other
15:54:51 22 whether that was as it's moving away from 33 and
15:54:54 23 37 Schmarbeck, as was seen in the earlier video,

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15:54:59 1 when Moriarity and Schultz pulled away first?

15:55:02 2 **A.** Yes.

15:55:02 3 **Q.** Okay. Does that seem to be a different
15:55:05 4 camera angle on the departure of that patrol
15:55:09 5 vehicle from Schmarbeck --

15:55:11 6 **A.** Yes.

15:55:11 7 **Q.** -- before it started to back up? Okay.

15:55:17 8 All right. And do we now see that vehicle
15:55:20 9 backing up?

15:55:20 10 **A.** Yes.

15:55:20 11 **Q.** And do we see Officers Moriarity and
15:55:23 12 Schultz getting out?

15:55:24 13 **A.** Yes.

15:55:24 14 **Q.** And I think you said Moriarity was
15:55:27 15 driving, so the guy who got out of the driver's
15:55:30 16 side is this gentleman here?

15:55:31 17 **A.** Yes.

15:55:31 18 **Q.** That's Moriarity.

15:55:33 19 And this gentleman who got out of the
15:55:36 20 passenger side is Schultz.

15:55:37 21 **A.** Yes.

15:55:37 22 **Q.** Okay. All right. Now, we might have
15:55:39 23 a little bit of downtime here for a second, so

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15:55:42 1 there's nothing really going on here, so I'm going
15:55:45 2 to fast-forward it. I don't think any persons come
15:55:48 3 into the screen for a while.

15:55:49 4 Okay. So now, all right, do we see
15:55:57 5 Mr. Kistner -- we see Earl in the bottom left?

15:55:59 6 **A.** Yes.

15:55:59 7 **Q.** And do we see Mr. Kistner being walked
15:56:02 8 back to patrol vehicle 532?

15:56:04 9 **A.** Yes.

15:56:04 10 **Q.** Okay. And which officers are walking
15:56:07 11 him back there?

15:56:10 12 **A.** That, I -- I believe that is Officer
15:56:14 13 Moriarity and myself and Officer Schultz, and then
15:56:17 14 Officer Schultz breaks away.

15:56:19 15 **Q.** Okay.

15:56:19 16 **A.** So then that is Officer Schultz, and
15:56:24 17 then with Mr. Kistner is still myself and Officer
15:56:26 18 Moriarity.

15:56:26 19 **Q.** Which one are you? Closest to the
15:56:29 20 camera or furthest away?

15:56:30 21 **A.** I'm the closer of the two.

15:56:33 22 **Q.** Okay. To -- to the vantage point of
15:56:36 23 the viewer. Okay.

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15:56:36 1 **A.** Yes. So between the other two
15:56:38 2 officers, I guess.

15:56:39 3 **Q.** Gotcha. Okay.

15:56:39 4 So he's being put in the driver's side rear
15:56:43 5 seat; is that correct?

15:56:44 6 **A.** Yes.

15:56:44 7 **Q.** Okay. And I think you told me that was
15:56:46 8 a caged enclosure?

15:56:48 9 **A.** Yes.

15:56:48 10 **Q.** So he's put in there. Is the door
15:56:50 11 closed?

15:56:51 12 **A.** Yes, I believe so.

15:56:52 13 **Q.** Okay. So he can't get out.

15:56:54 14 **A.** Correct.

15:56:54 15 **Q.** All right. So now we see officers
15:56:56 16 coming up to Earl, and we talked about this
15:56:59 17 a little bit before, and I'm just going to play it.

15:57:10 18 I guess I backed up too far.

15:57:12 19 So Schultz gestures towards Earl and
15:57:19 20 approaches him?

15:57:20 21 **A.** Yes.

15:57:20 22 **Q.** Okay. We've seen some of this from
15:57:24 23 another angle.

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15:57:25 1 Earl is walking away. Schultz grabs him.

15:57:27 2 Do you know why?

15:57:27 3 **A.** I don't.

15:57:28 4 **Q.** Okay. Now, Earl appears to be on the
15:57:31 5 phone, right?

15:57:32 6 **A.** It appears so.

15:57:33 7 **Q.** Does Schultz take his phone?

15:57:36 8 Why are they doing this to him?

15:57:37 9 **A.** I don't know.

15:57:37 10 **MS. HUGGINS:** Form.

15:57:38 11 **BY MR. RUPP:**

15:57:38 12 **Q.** Okay. Did you -- did you intervene or
15:57:41 13 ask them to stop?

15:57:43 14 **A.** I don't remember.

15:57:44 15 **Q.** Had the young man done anything?

15:57:47 16 **A.** I don't remember.

15:57:47 17 **Q.** Okay. Well, you're standing right
15:57:49 18 there. Did you think it was appropriate for the
15:57:53 19 officers to rough up Earl?

15:57:55 20 **MS. HUGGINS:** Form.

15:57:55 21 **BY MR. RUPP:**

15:57:56 22 **Q.** We'll watch it again.

15:58:25 23 Did you see Officer Schultz take Earl's

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15:58:28 1 telephone away from him?

15:58:29 2 **A.** I saw him take something.

15:58:30 3 **Q.** Do you know why he did that?

15:58:31 4 **A.** I don't.

15:58:37 5 **Q.** Is that proper police -- police
15:58:38 6 procedure?

15:58:38 7 **A.** It would depend on the situation.

15:58:39 8 I -- I don't remember --

15:58:40 9 **Q.** What about this situation?

15:58:41 10 **A.** I don't remember what the conversation
15:58:43 11 was.

15:58:43 12 **Q.** Okay. Do you know why they start
15:58:46 13 pulling and pushing Earl?

15:58:47 14 **A.** I don't.

15:58:48 15 **Q.** You were standing right there, right?
15:58:50 16 You were watching this?

15:58:51 17 **A.** Yes.

15:58:51 18 **Q.** Do you intervene at any time and tell
15:58:55 19 them to stop?

15:58:55 20 **A.** I don't remember.

15:58:57 21 **Q.** Officer Schultz was the most senior
15:58:59 22 officer on the scene, right?

15:59:01 23 **A.** Yes.

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15:59:22 1 Q. Do you know why Officer Schultz went
15:59:25 2 back to the SUV?

15:59:25 3 A. I don't.

15:59:27 4 Q. Do you know if he was running Earl's
15:59:29 5 license?

15:59:29 6 A. He may have been.

15:59:31 7 Q. Would that be police procedure?

15:59:35 8 A. It might be. I mean, I don't --

15:59:38 9 Q. To see if he has a warrant or
15:59:39 10 something?

15:59:40 11 A. I -- I don't know why he would have, if
15:59:42 12 that's what he was even doing.

15:59:50 13 Q. Was Earl detained at this point, or was
15:59:52 14 he free to go?

15:59:54 15 A. From what I'm watching, it appears he's
15:59:56 16 free to go, but I don't remember.

15:59:59 17 Q. Do you know if he had been given back
16:00:00 18 his possessions?

16:00:01 19 A. I don't know.

16:00:03 20 Q. Do you know why they were taken from
16:00:04 21 him?

16:00:05 22 A. I do not.

16:00:16 23 Q. Do you know if at this point or by this

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16:00:17 1 point Mr. Kistner had complained of being injured?

16:00:20 2 **MS. HUGGINS:** Form.

16:00:20 3 **THE WITNESS:** I don't remember.

16:00:21 4 **BY MR. RUPP:**

16:00:23 5 **Q.** Do you know why it took -- why there
16:00:25 6 was this delay in taking him to the hospital?

16:00:27 7 **A.** I don't know.

16:00:30 8 **Q.** Do you think he should have been taken
16:00:32 9 to the hospital?

16:00:33 10 **A.** I don't remember what the conversation
16:00:36 11 was or if he had complained of injury yet. I don't
16:01:16 12 remember.

16:01:16 13 **Q.** Do you remember anything Earl said?

16:01:18 14 **A.** I don't.

16:01:20 15 **Q.** Do you remember anything that was said
16:01:21 16 by anyone to Earl?

16:01:22 17 **A.** I don't remember.

16:01:23 18 **Q.** Did you speak to Earl?

16:01:26 19 **A.** I may have. I don't remember.

16:01:29 20 **Q.** Okay. Did you see on officer returning
16:01:34 21 some items to Earl?

16:01:34 22 **A.** Yes.

16:01:35 23 **Q.** Do you know which officer that was?

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16:01:36 1 **A.** Could you go back? I think it was
16:01:39 2 Moriarity walked back from the patrol vehicle.
16:01:43 3 Moriarity.
16:01:52 4 **Q.** Is that the one with the hat?
16:01:54 5 **A.** Yes.
16:01:54 6 **Q.** Okay. Are you in this picture?
16:02:17 7 **A.** I think that's Officer Velez.
16:02:20 8 **Q.** Do you know what's being discussed?
16:02:22 9 **A.** I don't.
16:02:30 10 **Q.** Who's that gesturing and looking back
16:02:34 11 south on Scharmbeck?
16:02:36 12 **A.** I think it's Officer Velez.
16:02:46 13 **Q.** Did you ever see Officer Moriarity
16:02:48 14 writing something down? Writing a note?
16:02:53 15 **A.** You'd have to play it again.
16:02:56 16 **Q.** Well, do you remember seeing that at
16:02:57 17 the scene?
16:02:58 18 **A.** I don't remember it from that day.
16:03:03 19 **Q.** Do you remember having any -- any
16:03:05 20 conversations with anybody in the home at
16:03:08 21 37 Scharmbeck?
16:03:12 22 **A.** I don't believe I ever went inside.
16:03:13 23 **Q.** Well, I didn't ask you that.

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16:03:15 1 Did anybody call out the window or purport
16:03:20 2 to speak to the officers on the street from
16:03:22 3 37 Scharmbeck?

16:03:23 4 **A.** I believe a woman yelled out the
16:03:25 5 window, but I don't remember if I was the one that
16:03:26 6 responded or not.

16:03:27 7 **Q.** Do you remember what she said?

16:03:28 8 **A.** I don't.

16:03:30 9 **Q.** Do you remember anybody saying that you
16:03:32 10 were on camera?

16:03:34 11 **A.** I remember knowing that there was
16:03:37 12 a camera. I just don't remember how that
16:03:40 13 information was told to me. If she yelled that or
16:03:43 14 if someone else said it that day, I -- I don't
16:03:46 15 remember, but I remember it being told to me.

16:03:51 16 **Q.** Do you have an opinion about
16:03:53 17 surveillance cameras?

16:03:56 18 **A.** No.

16:04:14 19 **Q.** In the upper left-hand corner, we see
16:04:16 20 some officers. Do you know what's being discussed?

16:04:18 21 **A.** No.

16:04:19 22 **Q.** Do you have any recollection, from the
16:04:20 23 time Mr. Kistner was placed in the 532 patrol

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16:04:24 1 vehicle, what any officers were discussing with
16:04:26 2 each other?

16:04:27 3 **A.** No.

16:05:02 4 **Q.** Do you know why Mr. Kistner is not
16:05:04 5 being transported to the hospital?

16:05:05 6 **A.** I don't.

16:05:08 7 **Q.** Is this type of delay usual?

16:05:12 8 **MS. HUGGINS:** Form.

16:05:13 9 **THE WITNESS:** It would depend on the
16:05:15 10 situation.

16:05:16 11 **BY MR. RUPP:**

16:05:17 12 **Q.** Would the situation be that you were
16:05:19 13 all talking to each other to get your stories
16:05:20 14 straight?

16:05:21 15 **MS. HUGGINS:** Form.

16:05:21 16 **THE WITNESS:** No.

16:05:56 17 **BY MR. RUPP:**

16:05:56 18 **Q.** Are you shown in the picture as it
16:05:58 19 reads at 10:34:12?

16:06:00 20 **A.** Am I shown?

16:06:01 21 **Q.** Yeah.

16:06:01 22 **A.** I'm not sure if that's -- I think that
16:06:03 23 might be Officer Velez up in the left-hand corner.

JACK W. HUNT & ASSOCIATES, INC.

1120 Liberty Building

Buffalo, New York 14202 - (716) 853-5600

McDermott - Rupp - 2/19/20

400

16:06:09 1 I can't tell if that's her or me.

16:06:09 2 **Q.** Okay.

16:06:15 3 **A.** I think that's Officer Velez.

16:06:53 4 **MR. RUPP:** All right. Thank you,
16:06:54 5 Ms. McDermott. I have no further questions.

16:07:11 6 **MS. HUGGINS:** I have no questions.

16:07:13 7 **MR. RUPP:** Okay. We're done.

8 (Proceedings of 2/19/20 were then concluded
9 at 4:07 p.m.)

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1 I hereby CERTIFY that I have read the
2 foregoing 400 pages, and that except as to those
3 changes (if any) as set forth in an attached errata
4 sheet, they are a true and accurate transcript of
5 the testimony given by me in the above entitled
6 action on February 19, 2020.

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8
9 -----
LAUREN McDERMOTT
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1 STATE OF NEW YORK)

2 ss:

3 COUNTY OF ERIE)

4

5 I DO HEREBY CERTIFY as a Notary Public in and
6 for the State of New York, that I did attend and
7 report the foregoing deposition, which was taken
8 down by me in a verbatim manner by means of machine
9 shorthand. Further, that the deposition was then
10 reduced to writing in my presence and under my
11 direction. That the deposition was taken to be
12 used in the foregoing entitled action. That the
13 said deponent, before examination, was duly sworn
14 to testify to the truth, the whole truth and
15 nothing but the truth, relative to said action.

16

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ANNE T. BARONE, RPR,
Notary Public.

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